Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

DARRELL L. WESSELS,

Petitioner,

v.

STATE OF IOWA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF IOWA
AND APPENDIX

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED FOR REVIEW

WHETHER IT CONSTITUTES ERROR FOR THE STATE SUPREME COURT TO UPHOLD THE CONVICTION FOR THEFT BY A DEFENDANT WHO ALLEGEDLY TOOK STATE PROPERTY WHEN THE RECORD DID NOT CONTAIN PROOF BEYOND A REASONABLE DOUBT OF INTENT TO DEPRIVE THE STATE OF ITS PROPERTY AS REQUIRED BY STATE LAW, THE STATE CONSTITUTION AND THE UNITED STATES CONSTITUTION?

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Petitioner, Darrell L. Wessels, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Iowa Supreme Court issued on November 1, 1996 in which the Iowa Supreme Court refused to grant further review to the Petitioner's case when the Court below had improperly convicted him of theft without a showing that he intended to deprive the owner, State of Iowa, of its property on a permanent basis.

OPINIONS BELOW

The entire transaction which constituted the alleged theft was taped by the Iowa Department of Criminal Investigation with the knowledge of the Defendant. The Defendant was voluntarily given the transmitting equipment by the State informant and he wanted his attorney to see it to show that his privacy was invaded before he returned it. There was no contrary evidence of motive introduced by the State. The Defendant was convicted and first challenged the conviction for this lack of proof in a post trial motion (App. A) which was refused by the Trial Court (App. B).

This issue was appealed to the Supreme Court which remanded the case to the Court of Appeals. The Court of Appeals on a two to one vote upheld the conviction.

The opinion of the Iowa Court of Appeals issued August 30, 1996 is printed in the Appendix. (App. C). The Defendant then requested further review by the Iowa Supreme Court. The decision of the Iowa Supreme Court refusing further review in the case is printed in the Appendix.[1] (App. E).

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[1] Petitioner states that pursuant to U.S. Supreme Court Rule 14.1(h) the issue of failure by the trial court to require proof of the requisite intent was first raised by motion at the close of the State's evidence and again at the close of the case, and again by post trial motion. This issue was further raised by Brief in the Iowa Court of Appeals and by Application for Further Review, and is therefore preserved as an issue for a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals affirming the Petitioner's conviction was entered on August 30, 1996. (App. C). A timely Application for Further of Review was filed by the Petitioner and is set forth in the Appendix. (App. D). The Application for Further Review was denied by the Supreme Court on November 1, 1996. (App. E).

REASONS FOR GRANTING WRIT

Error occurs when the State courts violate a Defendant's right to Due Process by failing to require the required element of criminal intent in a case involving a Defendant who is accused of stealing property owned by that state.

Certiorari should be granted because the courts of the State of Iowa applied a discriminatory standard in convicting the Petitioner of theft by refusing to require proof beyond a reasonable doubt that the Defendant intended to permanently deprive the State of Iowa of its property. As a result he was deprived of a fair trial. The statutory provisions which the Petitioner believes confers jurisdiction on this Court to review the judgment or decree of the Iowa Court of Appeals and the Iowa Supreme Court is 28 U.S. C Section 2101 and U.S. Supreme Court Rule 13.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTE

1. Amendment 14 U.S. Constitution states: All persons born or naturalized in the United States, and subject to the jurisdiction are citizens of the

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See also Appellant's Brief.

United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

2. Article I, Section 9, Iowa Constitution states: The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.

3. Section 714.1 Code of Iowa states: A person commits theft when the person does any of the following: Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.

STATEMENT OF FACTS

On September 13, 1994, Dennis Gable, an employee of Darrell Wessels, the Petitioner, came to his office wired with a transmitter and engaged him in a conversation in connection with an investigation of the State Department of Criminal Investigation of sales of feeder pigs. Part-way through the conversation he thought that Dennis Gable may have a transmitter on him and asked to pat him down. He patted him down and discovered there was a transmitter. Dennis Gable indicated he would take the transmitter off, he did, and left the transmitter in Darrell Wessels' office. The entire exchange was tape recorded by the Department of Criminal Investigation off the transmitter. The tape recording indicated that the informant offered to remove the transmitter and that while he was doing so the Defendant spoke on the business phone.

The Defendant and informant then exited the building and the informant left peacefully under the watchful eye of the Department of Criminal Investigation. The Defendant put the transmitter on the edge of a field and immediately called his attorney and left a message. The Department of Criminal Investigation agent came to the house and asked for the transmitter, and Darrell replied, "I don't have it now." He tried to phone his attorney again and was immediately arrested. His wife turned over the transmitter to his attorney within hours of the arrest.

STATEMENT OF THE CASE

Following a trial in this matter, the Defendant was convicted of first degree theft for allegedly "committing theft of property from the person of another with the intent to deprive the other thereof." On June 20, 1995 the Defendant was sentenced to an indeterminate prison term not to exceed ten years. On June 20, 1995 the Defendant filed his Notice of Appeal to the Iowa Supreme Court. The case was submitted to the Iowa Court of Appeals on October 30, 1996. The Court of Appeals made a split decision two to one to uphold the conviction. The dissent by Chief Justice Rosemary Sackett indicated that there was insufficient evidence of intent to deprive the owner, State of Iowa, of its property. The Court of Appeals found substantial evidence to support the factual element that Mr. Wessels intended to permanently deprive the State of its transmitter based on two facts:

1. Once Gabel had removed the transmitter the defendant grabbed it and would not return it, though asked to do so; and

2. When asked by a DCI agent, the defendant again refused to do so.

ARGUMENT

The United States Supreme Court has long held that the due process clause of the Fourteenth Amendment to the United States Constitution protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed. 2d 368, 375 (1970). The Due Process clause of the Iowa Constitution, Article I Section 9, has been similarly construed by the Iowa Supreme Court. State v. Gibbs, 239 NW2d 866 (IA 1976); State v. Groetken, 479 N.W.2d 298 (IA 1991).

The Iowa theft statute Section 714.1, requires proof beyond a reasonable doubt that the Defendant intended to permanently deprive the owner of its property.

Iowa Uniform Jury Instruction 1400.2, states:

> *"The intent to "deprive the other" of the property means to permanently withhold or withhold for so long or under such circumstances, that its benefit or value is lost; or, the property is disposed of so that it is unlikely that the owner will recover it."*

A person's mere taking of another's property does not constitute larceny in absence of felonious intent, State vs. Cox, 34 NW 616 (Iowa 1949). Intent to permanently deprive, in the theft case, almost always has to be proved by circumstantial evidence, People vs. Martin-Trigona, 444 NE2d 527 (Ill. App. 1982). This intent must exist contemporaneously with the time when the defendant obtains actual possession of the property, State vs. Smith, 202 NW 511 (Iowa 1925). A failure to

act with stealth is an indication that an individual is not intending to permanently deprive the owner of property, Tate vs. State, 706 P2d 169 (Okla. Cr. 1985) and State vs. Schmidt, 30 NW2d 473 (Iowa 1948) If there exists a short term purpose for depriving somebody of their property, then the intent to permanently deprive will not be found, Warren vs. State, 784 SW2d 56 (Tex App 1 Dis 1989). In this case, a police officer was temporarily deprived of his pants to hamper his ability to follow a suspect. Further, if the person taking the property has a condition for the return of the property, then there can be no intent to permanently deprive the owner of the property. See State vs. Durnham, Supra. In State vs. Ferrel, 679 P2d 224 (Mont 1994), defendant held onto a check until the owner of the check paid for damage to her garden. No intent was found to deprive in this case. In Manley vs. State, 633 SW2d 881 (Tex. Cr. App 1982), defendant restaurant customer left without paying for his meal because he had asked for a discount and had not been told whether he would be entitled to it yet. He left his business card with a remark which indicated when the matter could be satisfactorily resolved, he would pay. Once again intent to permanently deprive was not found. Another circumstance to consider is how long the person obtaining the property voluntarily held onto it. In People vs. Davis, 523 NE2d 163 (Ill App 2 Dist. 1988), an individual who took a gun and held onto it for ten months was found to have intended to permanently deprive the owner of the property. See also State vs. Wood, 46 Iowa 116.

The absolutely uncontested evidence of Mr. Wessels' intent with respect to the property is as follows:

1. Wessels obtained the property with full knowledge of both Gabel and the DCI agents;

2. Wessels had no apparent need for a transmitter for his personal us in connection with his business or otherwise, nor did he have an apparent need for the property so that he could sell it to provide him with money;

3. Wessels indicated that he wanted the transmitter temporarily to show it to his attorney as proof of the State's invasion of his privacy;

4. Wessels phoned his attorney immediately after hiding the transmitter in a place where he could get it and it would not be found by the DCI agents if they immediately came to search;

5. When he was asked by the DCI agents about the transmitter, he indicated, *"I don't have it now"* and immediately asked to phone his attorney again;

6. The transmitter was actually delivered to his attorney's office by his wife, on his instruction within four hours of hiding it;

7. The transmitter was not damaged in any way and was functional on its return.

The intent element of the offense of theft requires "specific intent". Other than the expressed intention of Mr. Wessels that he was not intending to hang onto the property permanently, there was no direct evidence of his intent in the record. If the State is relying on any other evidence to support a different intent, that evidence must be circumstantial. In order for the

evidence to be probative, it must raise a fair inference of guilt, it must do more than create speculation, suspicion or conjecture, State vs. Schrier, 300 NW2d 305 (Iowa 1981); State vs. Salkil, 441 NW2d 386 (Iowa App. 1989). The only possible inference that can be made from Mr. Wessels' conduct after he was given the transmitter by Gabel, and before he was arrested, a period of 15 to 20 minutes, if closely examined, is that he did not intend to keep it permanently. The only other possible theory in absence of Defendant's need to use a transmitter himself or to sell it, is a vengeance motive, i.e. Darrell was so angry with the State that he wanted to deprive it of its property forever. If this were the case, there would be no reason why he could not have smashed it, dropped it down a well, et cetera, to make it inoperable. The very fact that Wessels said "*I don't have it now*", when asked about the property, indicates that he was planning to have it in the future and could have turned it over in the future. The most telling fact is that the State never offered any theory of why Darrell would want to permanently deprive the DCI of this transmitter at any stage of the proceedings. In short, the circumstantial evidence in the record does not support a fair inference that Wessels intended to permanently deprive the State of its property.

It is easy to understand just how ridiculous a finding of "intent to permanently deprive", is in this case, when comparing it to other theft cases appealed to the Iowa Supreme Court on the issue of intent. In State vs. Ascaossey, 203 NW2d 731 (Iowa 1972), this Court found sufficient evidence to support a finding of intent to deprive. On the night in question, a store closed at 9:00 p.m. Sometime after 11:00 p.m., the defendant and the store's assistant manager backed up to the loading

dock with a van type of truck and loaded approximately $400.00 worth of merchandise into the truck. The defendant then drove the truck into the driveway of his home, under the watchful eyes of two police officers. The assistant store manager gave the police a written statement claiming that the defendant flashed large sums of cash and asked him if he wanted to make some money and then proposed that they obtain cigarettes and other items from the store and defendant would pay the assistant manager half of the retail value. The assistant manager said that thefts of this nature had already taken place on two previous occasions and that the case under consideration was the third such theft. In another case, State vs. Auerbach, 283 NW2d 278 (Iowa 1979), this Court determined that a guilty plea had to be invalidated because the record did not have sufficient evidence to show that the defendant intended to permanently deprive the owner of a vehicle. In the case, defendant indicated that he took a vehicle that was not his and he did not intend to return the vehicle to its owner. The argument on appeal was that his lack of intent of returning the vehicle is not the same thing as an intent to permanently deprive. He could have intended to leave it, for example, in a location where the owner would find it or return it to a third person for ultimate return to the owner. The facts of this case are quite similar to the facts in Darrell Wessels' case. The only thing shown by the record for certain, if one ignores Darrell Wessels' explanation of his intent, is that:

> 1. The property was actually withheld for 15 or 20 minutes by the defendant himself, before he was arrested.

2. When the defendant was asked for the property, he said *"I don't have it now"*;

3. The property was not disposed of so that it was unlikely to be recoverable.

In short, the original verdict in this case was a GROSS MISCARRIAGE OF JUSTICE and the Iowa Supreme Court's failure to review the matter merely perpetuates this miscarriage of justice.

In summary, this Court should recognize that the logic of dissenting Chief Justice Rosemary Sackett is clearly more compelling than the unreasoned and superficial decision of Justices, Habhab and Huitink. A Writ of Certiorari should be granted in this matter by the United States Supreme Court to review the decision of the Iowa Appellate Courts and correct this violation of the Defendant's constitutional guarantee that his liberty will not be taken without due process of law.

DATED: January ___, 1997

Respectfully submitted,

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JUDITH O'DONOHOE

COUNSEL FOR PETITIONER

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App. 1

IN THE IOWA DISTRICT COURT FOR MITCHELL COUNTY

STATE OF IOWA,
Plaintiff,

vs.

DARRELL WESSELS,
Defendant.

Criminal No. 4149-0994

MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT PURSUANT TO IOWA RULE OF CRIMINAL PROCEDURE 23

COMES NOW the Defendant, Darrell Wessels and in support of his motion for a new trial and in arrest of judgment states as follows:

1. On December 1, 1994, the jury returned its verdict of guilty of the charges of Theft in the First Degree and Theft in the Second Degree under Counts I and II of the County Attorney's information.

2. Sentencing in this matter is set for January 4, 1995, at 9:30 a.m.

3. The Defendant requests a new trial on the following grounds:

   a) The verdict is contrary to the law and/or the evidence;
   b) The Court had refused properly to instruct the jury;
   c) The prosecuting attorney has been guilty of judicial misconduct during the trial;
   d) The Defendant did not receive a fair and impartial trial;

4. The Defendant request a motion in arrest of judgment because the record as a whole, does not support the pronouncement of a legal judgment against the Defendant.

5. With respect to the charge of Theft in the First Degree, the evidence did not support the verdict because the following elements were not proved beyond a reasonable doubt:

   a) That there was an unlawful taking possession or control of property by Darrell Wessels without the consent of the possessor;
   b) The taking was from the person of Dennis Gabel
   c) There was an intent on the part of Darrell Wessels to deprive the owner of its property.

6. With respect to the charge of Theft in the Second Degree, the elements were not proved beyond a reasonable doubt as follows:

   a) That there was an unlawful taking possession or control of property

by Darrell Wessels without the consent of the possessor;

b) There was an intent on the part of Darrell Wessels to deprive the owner of its property;

c) The property taken had a value exceeding $1,000.00.

7. With respect to misinstruction of the jury, the Defendant has a right to specific instructions tailored to the facts of the case as they relate to the individual elements of the criminal offense. The Defendant requested such specific instructions as follows:

1.

"If you find that there is any reasonable doubt as to whether Darrell Wessels obtained the transmitter from Dennis Gabel against Dennis Gabel's will, then you must acquit Darrell Wessels."

Authorities:

State vs. Durham, 196 N.W.2d 428 (Iowa 1972)
Peoples vs. Hatch 401 N.W.2d 344 (Mich App 1986)
50 AmJur 2d cen . 23 page 175

2.

"If you find that there is any reasonable doubt as to whether Darrell Wessels intended to permanently withhold or withhold for so long or under such circumstances that the value of the transmitter was lost at the moment that he came into possession of the property, then you must acquit Darrell Wessels; the Defendant, in order to be convicted, must intend to deprive the owner of the property as set forth above at the same time that he is gaining possession of that property."

Authorities:

State vs. Wood, 46 Iowa 116
State vs.-Schmidt, 30 N.W.2d 472 (Iowa 1948)
50 AmJur 2d Larceny, Section 10

3.

"An intent to deprive another of property within the meaning of the law requires more than a temporary dispossessing of another's property."

Authorities:

State vs. Berger, 438 N.W.2d 29 (Iowa App 1989)

4.

"The mere action of taking property is not theft in absence of the intention to permanently deprive the owner of the property."

Authorities:

App. 3

State vs. Cox, 34 N.W.2d 616 (Iowa 1949)

5.

"If you find that there is any reasonable doubt as to any element of the offense charged, then you must acquit the Defendant."

Authorities:

State vs. Kimes, 124 N.W. 164 (Iowa 1910)

6.

"In determining whether Darrell Wessels had the specific intent of permanently depriving the owner of the transmitter, you may consider, in addition to other factors, the fact that Darrell Wessels did not take the property by stealth but with full knowledge of the owner and that the property was subsequently returned to the owner within 24 hours."

Authorities:

Stat2 V-S- Schmidt 30 N.W.2d 472 (Iowa 1948)

50 AmJur 2d cen . Section 15, page 166.

7.

"The value of property is an integral element of the offense charged. The value of property is its highest value by any reasonable standard at the time that it is stolen. In making a determination of this value, you may utilize such factors as the market value of the property within the community, the actual value of the property or replacement value; if a market value, within the community can be determined, then this is the preferred standard."

Authorities:

Section 714.3 of the Code of Iowa

State vs. Hardesy, 153 N.W.2d 464 (Iowa 1967)

State vs. Lewis, 123 N.W. 168 (Iowa 1909).

8.

If you find that there is a reasonable doubt as to whether Dennis Gabel consented to Darrell Wessels having possession of the transmitter then you must acquit Darrell Wessels on both charges.

Authorities:

71 ALR 3d 271 Section 4b at page 281-282

9.

Property in the Defendant's possession by consent of the owner or possessor can not be deemed to have been taken from the person of the owner or possessor.

App. 4

Authorities:

74 ALR 3d 271 Section 4b at Page 281-282

10.

To Constitute a taking from the person it is necessary that the property be taken either by stealth of by violent force.

Authorities:

State vs. Washington, 308 N.W.2d 422 (Iowa 1981)

State vs. Kobylasz, 47 N.W.2d 167 (Iowa 1951

8. The court refused to instruct any specific instructions and the instructions utilized were so general as to not give the jury adequate guidance regarding the proof required.

9. The prosecutors conduct in his rebuttal argument constituted misconduct in that he made the following comments:

a) That the DCI agent, Searl could not get to be a DCI agent for 22 years in his position if he lied and that he knows DCI agents in this situation do not lie;

b) That Darrell Wessels made a deal to get out of jail in returning the transmitter;

c) That Darrell Wessels chucked the transmitter into the corn field:

The first statement is misconduct because it involves the prosecutor personally vouching for a witness and the remaining two statements are misconduct because it is argument beyond the scope of the record. Further the prosecutor attempted to introduce the DCI investigator officer Searl's opinion as to Darrell Wessels' reputation in the community when it was clear that he could not set the proper foundation for entry of the evidence. The only reason for attempting it was to prejudice the jury against the Defendant

10. Finally the Defendants believes that he did not received a fair and impartial trial because of all of the problems pointed out above taken as a whole.

WHEREFORE, the Defendant prays that the court grant him a new trial or in the alternative grant him a motion in arrest of judgment for the reasons set forth above.

"s/ Judith O'Donohoe"

JUDITH O'DONOHOE-FIOO04115 of

EGGERT, ERB, OTT, O'DONOHOE & FRYE

IN THE IOWA DISTRICT COURT FOR MITCHELL COUNTY

STATE OF IOWA,
Plaintiff, Cause No. 4149-0994

v.

DARRELL L. WESSELS, RULING
Defendant.

BE IT REMEMBERED that on the 3rd day of February, 1995, the above-entitled matter came on for hearing upon defendant's motion for new trial and motion in arrest of judgment and motion for acceptance by court of the defendant's bill of exceptions. State of Iowa appeared by Assistant Mitchell County Attorney Mark L. Walk, and defendant appeared by his attorney of record, Ms Judith O'Donohoe of Charles City, Iowa. The court having reviewed the entire matter and being duly advised in the premises now makes the following ruling,

Based upon review of the record as a whole in a light most favorable to the State, the court concludes substantial evidence supported the jury's verdict finding defendant guilty in the above-entitled matter. The court further concludes that the jury was properly instructed upon all of the applicable law in the case. The court further concludes defendant waived any exception to prosecutor's closing argument by failing to object and failing to request a record it the time said statements were made during the trial. The court further concludes that defendant. received a fair and impartial trial. Accordingly, the court determines that defendant's motions should be overruled and denied.

IT IS THEREFORE ORDERED that defendant's motion for new trial, motion in arrest of judgment and motion in arrest of judgment and motion for acceptance by court of the defendant's bill of exceptions be and the same are hereby overruled and denied.

Dated this 23rd day of February, 1995

"s/ John S. Mackey"
Judge of the Second Judicial District of Iowa

Clerk shall furnish copies to:
Mark L. Walk
Judith O'Donohoe

IN THE COURT OF APPEALS OF IOWA

No. 6-254 95-1070

STATE OF IOWA,

Plaintiff-Appellee

vs.

DARRELL L. WESSELS,

Defendant-Appellant.

Appeal from the Iowa District Court for Mitchell County, John S. Mackey and Jon Stuart Scoles, Judges.

Defendant appeals from his conviction of first-degree theft. **AFFIRMED.**

Judith O'Donohoe of Eggert, Erb, O'Donohoe, Frye & Von Ah, Charles City, for appellant.

Thomas J. Miiler, Attorney General, Martha E. Boesen, Assistant Attorney General, Douglas R. Marek, Deputy Attorney General, Jerry H. Folkers, County Attorney, and Mark L. Walk, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

Defendant Darrell Wessels appeals from his conviction of first-degree theft. He raises several arguments which include: 1) there was insufficient evidence to support the conviction; 2) testimony should not have been allowed about the value of a stolen transmitter and an attempt to retrieve it; 3) the trial court erred in failing to give ten jury instructions defendant requested; 4) the court erred in failing to grant defendant's request for a new trial; and 5) the trial court abused its discretion in sentencing defendant to the maximum penalty. We affirm.

Defendant's feeder pig business was under investigation by the Iowa Division of Criminal Investigation (DCI). An employee of the business, Dennis Gabel, was cooperating with the DCI and met with defendant wearing a body transmitter. At some point during the meeting defendant frisked Gabel and discovered the transmitter. Gabel testified defendant tried to rip the microphone off of Gabel's chest and grabbed a pair of wire cutters and was going to cut the wires. Gabel told defendant, "I'll take it off. Just calm down, Darrell."

Gabel took off some of his clothing so he could remove the transmitter. When it fell to the floor, he and defendant both reached for it and defendant grabbed it.

Defendant would not return it despite Gabel's request to do so. Defendant told Gabel to leave. Defendant placed the transmitter in a cornfield near his property and unsuccessfully attempted to call his attorney. Approximately fifteen minutes later a DCI agent who had been monitoring the recorded conversation went to defendant's home and attempted to retrieve the transmitter. When defendant would not provide it to the agent, he was arrested for theft.

Defendant was charged with first-degree theft for committing the theft of property from a person and second-degree theft for committing the theft of property having a value in excess of $1000. The jury returned a guilty verdict on both counts. The verdicts were merged for sentencing and a conviction and judgment was entered only on the offense of first-degree theft.

I. Sufficiency of the Evidence. Defendant argues the State erred in submitting the charge of theft to the jury due to the insufficiency of the evidence to prove a taking without consent, a taking from the person of Dennis Gabel an intent to permanently deprive the owner of the property, and the value of the property. Given the jury's verdicts on counts I and II were merged and defendant was

convicted only of first-degree theft we need not address his sufficiency of the evidence claims which pertain to the charge of second-degree theft.

When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 3 7 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. Id at 37-3 8.

Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. Id We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

A review of the record reveals there was substantial evidence to support the conviction. Defendant had made incriminating statements during his recorded conversation with Gabel. Gabel testified defendant tried to rip the microphone off of him and grabbed wire cutters in an attempt to cut the wires. Once Gabel had removed the transmitter, defendant grabbed it and would not return it even though asked to do so. When asked by a DCI agent to return it, defendant again refused to do so.

Defendant offered contradictory testimony, indicating Gabel was embarrassed to have been discovered wearing the wire and voluntarily gave it to defendant. Defendant also claims he did not intend to permanently keep it but planned on turning over the transmitter to his attorney. The jury is free to believe or disbelieve any part or all of a witness's testimony. *See State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990).

There was sufficient evidence to convince a rational trier of fact defendant took possession or control of the transmitter from the person of Gabel and did so with the intent to deprive him of the property.

II. Testimony of Agent Day. Defendant raises two arguments with respect to the testimony of Agent Day. He first argues the agent should not have been allowed to testify as to the value of a new transmitter. He contends the agent lacked the qualifications to express an opinion on the value of the transmitter. The value of the transmitter was not an issue with respect to the charge of theft from a person. *See State v. Thornton*, 506 N.W.2d 777, 780 (Iowa 1993) (@y

theft from the person of another is first-degree theft regardless of value). Since the issue of the value of the transmitter is relevant only to the charge of second-degree theft and the jury's verdict on that charge was merged with the first-degree charge, we need not address the merits of Agent Day's qualifications to express an opinion on the value of the transmitter, but if we had to, we would conclude that he was qualified.

Defendant also argues it was beyond the minutes of testimony for the court to allow Agent Day to testify about the attempt to retrieve the transmitter from defendant. The State is required to file minutes of testimony for each witness expected to testify at trial. Iowa R. Crin-L P. 5(3). The minutes must be filed with the trial information and supply a full and fair statement of the anticipated testimony. *State v. Wells*, 522 N.W.2d 304, 307 (Iowa App. 1994). The obligation to provide a full and fair statement does not require the State to use precision in composing the expected testimony of each witness named in the minutes. *Id.* The "full and fair" statement standard mandates the prosecutor adequately alert the defendant to the source and nature of the testimony, and place defendant on notice of the need for further investigation of the particular details of the witness's expected testimony. *Id.*

The minutes alerted defendant that Agent Day was a technical specialist with the DCI and was expected to testify about the value of the transmitter and his monitoring of the conversation between Gabel and defendant on September 13, 1994. The general subject of the minutes was the transmitter and it was within the nature of this testimony for Day to testify how he fitted Gabel with the transmitter as well as the DCI's efforts to retrieve the transmitter after defendant had discovered its existence. *See State v. Caldwell*, 404 N.W.2d 186, 188 (Iowa App. 1987) (testimony not specifically identified in minutes not precluded if within general subject of testimony identified in the minutes). We find it was well within the trial court's discretion to allow this testimony.

III. Jury Instructions. Defendant claims the trial court should have submitted the ten jury instructions he requested. "The trial court's decision on instructions will not be disturbed absent an abuse of the trial court's discretion. " *State v. Cunningham*, 463 N.W.2d 887, 889 (Iowa App. 1990). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* The burden of proving an abuse of discretion lies with a defendant. *Id.*

Jury instructions are designed to explain the applicable law to the jurors so the

law may be applied to the facts proven at trial. *Id.* A trial court's instructions must all be read together. *Id. State v. Sauls*, 356 N.W.2d 516, 520 (Iowa 1984). A trial court does not err in refusing to submit a requested instruction where the substance of the instruction was adequately incorporated in, or duplicative of, the instructions which were given to the jury. *State v. Spargo*, 364 N.W.2d 203, 210 (Iowa 1985); *State v.Hatter*, 342 N.W.2d 851, 857-58 (Iowa 1983).

Defendant's requested instructions one, five, and nine pertain to whether the jury had any reasonable doubt as to whether the transmitter was taken without Gabel's consent and whether the jury had to find each element of the offense beyond a reasonable doubt. Instructions four, nine, and seventeen adequately advised the jury of the concept of "reasonable doubt' and that the State was required to prove each element beyond a reasonable doubt. Instructions fifteen, seventeen, and twenty adequately explained the elements of first-degree theft and the intent to deprive another of property by removing it from a person. The content of defendant's requested instructions one, five, and nine was already adequately addressed by the instructions the court gave and it was not an abuse of the court's discretion to refuse to give them.

In requested instruction two, defendant sought to have the jury instructed an "intent to deprive" must exist when a person is initially deprived of property. Instruction twenty adequately apprised the jury an "intent to deprive, means to entry withhold or to withhold for such time or under such circumstances as to cause the property to lose its value. In his requested instruction number three, defendant wanted the jury to be instructed to consider whether the dispossession of property was temporary in nature. Instruction twenty adequately advised the jury to consider whether the deprivation of property was temporary or permanent in nature. Defendant's requested instruction number four regarding permanent deprivation of property was also sufficiently encompassed by instruction twenty.

Defendant's requested instruction number six seeks to have specific factors listed which the jury can consider in finding a specific intent to permanently deprive. Instructions twenty and twenty-one adequately instruct the jury on these matters. In requested instruction seven, defendant sought to have the jury instructed 'market value is the preferred value if it can be determined. This issue is moot given that defendant was convicted of first-degree theft and, in any case, the issue of value was adequately encompassed within instruction nineteen.

In requested instruction ten, defendant wanted the jury instructed that property he obtained by consent could not be deemed to have been taken from the owner or possessor. Instructions seventeen and twenty adequately address this concern. In requested instruction eleven, defendant wanted the jury to be instructed it was necessary the property be taken by stealth or violent force. The law does not support giving this instruction and it was properly denied. We find the substance of defendant's requested ons one through seven, nine, and ten was adequately encompassed by the instructions by the court.

Requested instruction eleven was not otherwise consistent with the applicable law. There was no abuse of discretion in the trial court's refusal to give the instructions.

IV. Motion for New Trial. Defendant had filed a motion for a new trial which was denied. His motion asserted three grounds for a new trial: 1) the verdict was contrary to the law and/or the evidence; 2) the trial court had refused to properly instruct the jury; and 3) defendant did not receive a fair and impartial trial. In his brief defendant concedes his arguments with respect to the first two of these grounds are the same as those raised in separate arguments in his brief. Our analysis in sections I and III adequately dispose of those two issues and they need not be readdressed here.

Defendant's third ground for seeking a new trial is that he was denied a fair and impartial trial. We are not convinced error was preserved with respect to the many arguments defendant raises concerning this third ground. Nonetheless, we will address it on appeal. *See Ort v. Klinger*, 496 N.W.2d 265, 267 (Iowa App. 1992) Defendant claims he did not receive a fair trial because: 1) attorney O'Donohoe was not appointed as his court-appointed counsel; 2) the court refused to exclude the testimony of Agent Day regarding the value of the transmitter; 3) the court allowed Day to testify beyond the minutes of testimony; 4) the court refused to grant a judgment of acquittal at the close of the State's evidence; 5) the court refused to grant a judgment of acquittal at the close of all of the evidence; 6) the court refused to give defendant's requested jury instructions; 7) the court refused to grant a new trial; 8) the court refused to grant defendants request for court appointed appellate counsel; 9) defendant's ten-year sentence was excessive and out of proportion to the offense; and 10) defendant's sentencing should not have been delayed.

Motions for a new trial are governed by Iowa Rule of Criminal Procedure 23(2). The grant or denial of a new trial is committed to the sound discretion

of the trial court. *State v. Belt*, 505 N.W.2d 182, 184 (Iowa 1993). With respect to defendant's new trial claims involving Agent Day's testimony, the sufficiency of the evidence to support submission of the charges to the jury, and the refusal to submit defendant's jury instructions, those matters were raised by defendant as separate appellate arguments and are adequately addressed in sections I, II and III of this Opinion. Defendant's remaining claims relating to the appointment of counsel and his sentencing have no bearing on the claim he did not receive a fair and impartial trial. Defendant raised no valid claims for a new trial, and we find no abuse of discretion in the denial of his motion.

V. Sentencing. Pending defendant's sentencing on the theft claim, defendant pled guilty to an unrelated perjury charge concerning false statements made in art application to the Iowa Department of Agriculture. Sentencing on both the theft and perjury convictions occurred at the June 20, 1995, hearing.

At the sentencing hearing, defendant asked the court to consider a suspended sentence. The court instead imposed concurrent terms of incarceration, a term not to exceed ten years on the theft conviction and a term not to exceed five years on the perjury conviction. Defendant appeals the sentences imposed for both of the convictions.

A trial court has considerable discretion in sentencing. *State v. LeGrand*, 501 N.W.2d 59, 64 (Iowa App. 1993). "There is a strong presumption in favor of a sentence given by a trial court that is rebutted only by an affirmative showing of an abuse of discretion." *Id.* The burden of showing an abuse of discretion is on the defendant. *Id.*

We have carefully reviewed defendant's arguments and the transcript of the hearing and find no abuse of discretion. Defendant has a criminal history which the court was justified in taking into consideration at the sentencing hearing. As previously noted, we do not find that it was an abuse of discretion to sentence defendant to imprisonment.

AFFIRMED.

Hultink, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I dissent.

An employer of defendant was wearing a body transmitter on defendant's

premises attempting to record conversation the employee was having with defendant. Defendant was not told the conversation was being recorded. When he learned it was, he got angry and tried to rip the transmitter off the employee's chest and grabbed it when it fell to the floor. He put it in a cornfield and tried to call his attorney. Before he could talk to his attorney, a DCI agent asked for the transmitter. He did not give it to the agent. Defendant was charged and convicted of theft of the transmitter. I do not find substantial evidence of theft. The item was brought onto defendant's property by a person other than the one who asked for its return. There is no evidence defendant intended to keep the property beyond that time necessary to consult with his attorney. I would dismiss the conviction.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARRELL L. WESSELS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR MITCHELL COUNTY

THE HONORABLE JOHN S. MACKEY, JUDGE
THE HONORABLE JON S. SCOLES, JUDGE

DEFENDANT-APPELLANT'S APPLICATION FOR FURTHER REVIEW

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TABLE OF AUTHORITIES

Cases

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OTHER AUTHORITIES

50 AMJur2d Larceny, Section 23

50 AMJur2d Larceny, Section 34

Iowa Uniform Criminal Jury Instruction 1400.2

Section 714.2 Code of Iowa

Section 816.2 Code of Iowa

ISSUES PRESENTED FOR FURTHER REVIEW

BY THE SUPREME COURT

I. DID THE COURT OF APPEALS ERR IN FINDING THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY VERDICT CONVICTION OF THEFT ON THE ELEMENT OF *"TAKING WITHOUT CONSENT"?*

II. DID THE COURT OF APPEALS ERR IN FINDING THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE J-URY VERDICT CONVICTION OF THEFT ON THE ELEMENT OF *"INTENDING TO PERMANENTLY DEPRIVE THE OWNER OF THE PROPERTY"?*

STATEMENT OF THE CASE

On September 27, 1994, the prosecuting attorney filed a two count trial information against the Defendant, Darrell Wessels. Count I was for Theft in the Second Degree in violation of Section 714.2 of the Iowa Code committed as follows:

"The Defendant on or about the 13th day of September, 1994, in Mitchell County, Iowa did:- take possession of the property of another with the intent to deprive the other thereof."

The second count for Theft in the First Degree in violation of 714.2 of the Code was committed as follows:

"The Defendant on or about the 13th day of September, 1994, in Mitchell County, Iowa did: commit theft of property from the person of another with the intent to deprive the other thereof."

The matter came to trial; a verdict of guilty was returned on both counts. The conviction of Second Degree Theft merged into the conviction of First Degree Theft and in accordance with Section 816.2 of the Code, the Defendant was convicted of First Degree Theft only.

On June 20, 1995, the matter was set for sentencing and the Defendant was

sentenced to an indeterminate prison term, not to exceed 10 years. On June 20, 1995, the Defendant filed his notice of appeal: the matter was submitted to the Iowa Court of Appeals and on August 30, 1996, the Court of Appeals on a split decision two to one, upheld the conviction on the charge of Theft in the First Degree. Attached to this application is a copy of the Court of Appeals decision.

On September 19, 1996, the Defendant Appellant requests the Supreme Court to accept this case for further review, pursuant to Iowa Rule of Appellant Procedure 402. The Appellant is asking this Court to further review this case because he strongly believes that there is insufficient evidence to support a conviction of Theft as to the following two elements of the offense:

1. That the taking was without the consent of the possessor, Dennis Gabel; and
2. That the property, if taken, was taken by Darrell Wessels with the intent of permanently depriving the owner, State of Iowa of its property.

STATEMENT OF THE FACTS

In the late summer of 1994, Special Agent, Richard Searl, an employee of the Department of Criminal Investigation, was investigating Darrell Wessels of Rural Orchard, Iowa, for potential violations of the laws governing the feeder pig sales business. (App..p. 16, 86, 93, 123)

On Labor Day, 1994, Agent Searl executed a search warrant at the Wessels' residence and seized approximately $50,000.00 of equipment related to the feeder pig business. (App. p. 55) This was extremely traumatic for Mr. and Mrs. Wessels. (App.p 55) In August of 1994, Agent Searl enlisted the assistance of Dennis Gabel, an employee of the feeder pig business, who was 21, 5'10"tall and weighed 3OOpounds, in his investigation. Agent Searl decided that he would like to have Dennis Gabel engage Darrell Wessels in a conversation which might be incriminating on the feeder pig sales issues and to have Dennis carry a transmitter with him so that the conversation could be transmitted and recorded by himself in a vehicle down the road. (App.p 35) Agent Searl and another DCI Agent Day, installed a transmitter in Mr. Gabel's boot, ran wires up his leg underneath his pants to a microphone which was taped to his chest, on top of his t-shirt. They then placed another t-shirt over the microphone. (App.p. 5 & 33-36) Dennis Gabel drove into the Wessels' yard

and went to the door of their residence. Darrell was on the phone at the time and his wife invited Dennis inside. Dennis opted to wait out in the yard for Darrell. (App.p. 12 & 13 and 68, 69) Dennis Gabel indicated that his employment relationship with Darrell, up to this point in time, had been fine. (App.p. 11-12; 51-2) Darrell came out of the house and the two men went into a small office building approximately 55 feet away from the house. (App.p. 52) Their entire conversation was picked up by the microphone on Gabel and monitored by Agent Day in Agent Searl's car down the road. In the process, the conversation was also recorded on a tape recorder in the car. (App.p. 33-36 and 13) The conversation between Dennis Gabel and Darrell Wessels lasted 30 to 45 minutes. (App.p. 13) While Mr. Wessels and Mr. Gabel were conversing, Darrell was sitting behind the desk and Dennis was sitting in front of the desk, some six or seven feet away. (App.p. 17 & 56) In the course of the conversation, near the end of it, Darrell asked Dennis if he had a bug on him and Dennis replied "no". Darrell apologized for not trusting him and then padded him down in the chest area. (App.p. 53-4) In the process he discovered that there was a microphone underneath Dennis' shirt. The tape recording, itself, Exhibit 1, was played to the jury and a transcript of the spoken words, Exhibit 2, was given to the jury to follow along. The transcript is attached to this application for further review. Copies of the tape are also available. The following is a table of evidence contained in the record, based on Dennis' testimony, Darrell's testimony and the tape of the critical events which followed:

App. 20

SUMMARY OF TRIAL EVIDENCE

Discovery of the Bug by Darrell

Dennis Gabels' Testimony

Q. Do you remember what he said to you?

A. He was in the middle of saying something. He stopped and he told me to stand up, and when I stood up, he asked me if I was wearing a body wire or actually he asked me if I was wearing a bug and I said no. (App.p.6)

Q. Okay. When you told him no,

A. He then bear-hugged me more or less and physically frisked me till he found the wire.

Q. Okay, so he did find the wire?

A. Yes

Q. What did he then do?

A. He ripped it off, ripped the microphone off my chest and tried to pull it, the rest of the wires out and they wouldn't come out. He then grabbed a pair of side wire cutters and was going to cut the wire to the microphone. (App.p. 7)

Darrel Wessels' Testimony

A. Like Dennis said, I think I stopped right in the middle of a sentence and I asked him whether he was bugged and he said no and I think I said something to the effect, well, I'm sorry, I really can't trust anybody and I think I probably asked Dennis to stand up. I walked up to Dennis and patted him down in this area

(indicating)

Darrel Wessels' Testimony (continued)

Q. In his chest area?

A. Yes, and I felt something underneath of there. I wasn't sure it was an antenna but it was something under his outside shirt and I think at that point to be real honest, I don't know whether I asked him or whether he did himself. He pulled up his shirt and it exposed the wire coming up to whatever it is, speaker or whatever. Can't think of what it is. Mike, I'm sorry. (App.p. 53)

Tape of the Transmission

DG Yeah he was writing down what I told him.

DW You didn't sign anything?

DG I didn't.

DW You cannot verify the clippings of our tags verses round ear tags?

DG Yeah I know the metal and round ones, no I didn't...I didn't do that.

DW If they asked again, the reason for it was to prevent them (pigs) from hurting each other. That's the reason for it. Just like you guys, I'm going to defend myself. I'm not gonna get you guys in trouble, unless you guys get me in trouble. Here's what I'm saying. I'm sayin'...standup. You don't have a bug on you?

DG Huh? No.

DW I don't trust nobody. Sorry (giggle) not that I don't trust you. You have a pocket under there. Who's this wired to?

Offer of Dennis Gabel To Take Transmitter Off

Dennis Gabels' Testimony

Q. Okay, What then did you do?

A. I said calm down Darrell. I'll take it off my body.

Darrell Wessels' Testimony

A. No. The only comment that he made when he pulled up his shirt, exposed the wire, I took a hold of the wire presuming that it was-whatever it was connected to it would come up at that point he said take it easy or calm down, I'll take it off. (App.p. 54)

Tape of Transmission

DG I don't have to tell ya (defiantly)
I'll take it off. Just calm down, Darrell. (calmly)

Dennis' Removal of the Transmitter

Dennis Gabel's Testimony

Q. Okay. So then did you give the transmitter to Mr. Wessels?

A. No.

Q. What did you do with it?

A. I took it out of my boot and it was laying on the floor and as I went to reach for it he grabbed it. (App.p. 8)

Darrell Wessels' Testimony

Q. Okay. Were you grabbing him or pushing him or bear hugging him

or doing anything other than pulling

Darrell Wessels' Testimony (continued)

on the wire?

A. No. I had--I was--I was probably what, as shocked as he was shocked to have me find it. (App.p. 54)

Q. Did you tear anything off his t-shirt?

A. No.

Q. Did you grab any wire cutters, side cutters?

A. No. (App.p. 56)

Darrell's Phone Conversation and Dennis' Delivery of Transmitter

Dennis Gabels' Testimony

Q. Okay. Let me ask you this. Did the phone ring after Darrell asked you if you were wearing a bug?

A. No.

Q. You don't remember the phone ringing?

A. No, I don't.

Q. Okay, do you remember Darrell talking on the phone?

A. When it rang the first time, yes.

Q. But not the second time?

A. No.

Q. Okay. Okay. So it was at the point the transmitter fell to the floor and you - -both you and Darrell went for it and you asked for it back?

A. Yes.

Q. And at least in your recollection, at the point in time the telephone

A. It had rung the first time but not the second time

Dennis Gabels' Testimony(continued)

hadn't rung yet?

Q. Okay. Had the telephone rung the second time at that point?

A. No. (App.p. 18)

Q. Okay. Then as I understand it, you them proceeded to take off your boot and your trousers to extricate yourself from this transmitter. Is that what you testified to?

A. Yes.

Q. Okay. Okay. Where was Mr. Wessels?

A. Standing by the door of the office.

Q. Okay. And you were standing there or sitting where?

A. I was standing kind of behind the desk.

Q. Okay, so how far away were you from Mr. Wessels?

A. I don't know. Maybe three or four feet.

Q. Okay. And as you were sitting 3 or 4 feet away, then you were taking off your boot taking the transmitter out, taking off your trousers, and taking the wire out of your trouser leg. Is that correct?

A. Yes.

Q. Okay. And then after you did that what did you do after you took this transmitter off?

A. I---the transmitter fell to the floor and I pulled my jeans back up and I went to reach for the transmitter and Darrell was there. He grabbed it before I did. (App.p. 16-17)

Darrell Wessels' Testimony

Q. Okay. During the course of your

A. Yes. In my conversation with

Darrell Wessels' Testimony (continued)

--- after finding the bug did you have a phone call?

Dennis. I had one prior to finding the bug and then when Dennis was proceeding to take off the bug. he had taken of his trousers and taken it off, I had a phone call. yes.

Q. Okay. And where did you go then to take this phone call?

A. It was at my desk in the office.

Q. Okay. How far away was that from Dennis?

A. Well. Dennis had been sitting previously across the desk. which probably would have been like six. seven foot probably.

Q. Was there anything prohibiting pulling his trousers up and leaving?

A. No, he could have left. I was on the phone I never---I never tried to stop Dennis from leaving. (App.p. 56)

Q. Okay. What did he do with it while---after he took it off?

A. I believe when I got done with my phone conversation. the transmitter was laying on the--- actually there was a little filing cabinet right next to my desk and he took it off while I was on the phone. laid it on that filing cabinet and when I got done with my conversation. I picked up the transmitter and shut it off. (App.p 57)

Tape of Transmission

Phone rings a distance from the mike. 60 Seconds of static plus faint unintelligible conversation of Darrell talking on the phone. No sound of scuffle between.

Absence of Demand by Dennis For Return Of The Transmitter
Darrell Asks Dennis To Leave

Dennis Gabels' Testimony

Q. Did you say anything to him at that point?

A. Yeah, I told him I wanted the transmitter back. (App.p. 7)

Q. Okay. Right. And did you have any other conversation?

A. After I asked for it back, and he said no, he told me to get off his place so I walked to my car. (App.p. 18)

Darrell Wessels' Testimony

Q. Did Dennis ever make a demand on you to give---give him the wire?

A. No, he did not. (App.p. 56)

Q. And then what happened after that?

A. I asked Dennis to leave.

Q. Did he say anything at that point about taking the transmitter with him or wanting the transmitter?

A. No, he did not. (App.p. 57)

Tape of Transmission

5 seconds of static after phone conversation concludes.

DCI Agent Day testified that the microphone worn by Dennis Gabel had the capability of picking up any sound within 50 feet of it and then transmit it by way of a repeater to Agent Searl's vehicle where he was monitoring the conversation. (App.p. 41-47). He also indicated that he monitored the entire conversation until the microphone was turned off, just prior to Dennis and Darrell emerging from the office building and at no time was he concerned for Dennis Gabel's safety based on the conversation which he overheard. (App.p.35 - 6 and 43)

When Darrell Wessels emerged from the office building with Dennis Gabel he started for the house and reversed his direction and went toward an out building. (App.p 20-1 and 58-9) At the point of emerging from the office building, Darrell testified that he was confused, scared and disappointed over the intrusion to his privacy. His original intention was to go into the house but he changed his mind and decided to put the transmitter in a location not on his property so that if Agent Searl came to search, it would not be readily found and he would be able to hang on to it to show it to his attorney and discuss what could be done about the invasion of his privacy. (App.p. 58-9) He put the transmitter in a field adjacent to this property keeping track of where it was in relation to a building on his acreage and phone his attorney. (App.p. 58-9) According to the testimony of Laurie Simpson, secretary for his attorney, Darrell Wessels left a message for Judith O'Donohoe to call him on two occasions between noon and 1:00 p.m. Fifteen minutes after Gabel left the Wessels' property, Agent Searl appeared at the Wessels' door. Darrell answered it. Agent Searl asked for the "stolen property". (App.p. 37, 59, & 61) In reply to the inquiry from Agent Searl about the "stolen property", Searl first testified that Darrell said *"he "did not have it anymore and did not know where it was"*. (App.p.84) However, on cross-examination he admitted that in the affidavit he filed with the Magistrate's Court on September 13, 1994, what Darrell Wessels actually said to him was"I don't have it now". (App.p.85)After Darrell made this reply, Searl indicated that he attempted to use the telephone and in response to that he put handcuffs on him and arrested him. (App.p. 84) At approximately 1:00 p.m. Elaine Wessels called the attorney again and left a message that Darrell was in jail. (App.p. 77-8) Elaine then went into the jail to see Darrell and he described to her the location of the transmitter. (App.p. 79) By 3:00 or 4:00 p.m. she found the transmitter, by 5:00 p.m. she had delivered it to Darrell's attorney's office in Charles City with directions for it to be returned.. (App.p. 79) It was returned undamaged and was in use in the field by the DCI at the time of trial. (App.p. 33-34)

ARGUMENT

Appellate Standard of Review for Sufficiency of the Evidence

The Court of Appeal's Decision with Justices Habhab and Huitink in the majority and Justice Rosemary Sackett in dissenting, found that there was sufficient evidence to

support the jury verdict of guilty. In its decision, the Court of Appeals, cited the correct legal principles governing the scope of review on a defendant's appeal from a criminal conviction. However, the defendant contends that the standards, particularly as they inter-relate are more appropriately described and explained in the case of State vs. LaPointe 418 NW2d 49 (Iowa 1988) In this case at page 5 1, the governing principles were explained as follows:

1. The Court reviewed all of the evidence presented by both parties but views that evidence in the light most favorable to the State.
2. A guilty verdict must be support by substantial evidence in the record to support each and every element of the criminal offense.
3. Substantial evidence means such evidence as could convince a rationale trier of fact that the defendant is guilty beyond a reasonable doubt.
4. The evidence as to each element of the offense must raise a fair inference of guilt which means it must do more than raise suspicion, speculation or conjecture.

In this case, the Supreme Court reversed a conviction on the charge of tampering with a witness prohibited by Section 720.4 of the Code of Iowa. It found the facts in the light most favorable to the State to be: 1) Defendant assaulted his girlfriend on 2/21/86, causing her injury; 2) on 2/22/86, defendant, an attorney, called and offered his girlfriend $10,000.00 damages at the same time that he asked his girlfriend if she was planning to press charges against him; 3) criminal charges were filed against the defendant on 2/28/86; 4) several days before his girlfriend was to testify before a grand jury, the defendant typed up *"most important things to remember"* in a memorandum for her. Some of these suggestions were true and some were false. The elements of the crime are 1) offering a bribe; 2) to any person defendant believes has been or may be summoned as a witnessed in a judicial proceeding; 3) with the intent to improperly influence the witness' testimony. The Supreme Court found that the facts were insufficient to support the conviction of the Appellate Courts of this State, reveals, that the definition of theft, at no other time, has been expanded to encompass situations where there is there is reasonable evidence an intent to hold onto the property only for a specified period of time for a specific short term purpose. By analogy, if a teacher in a school confiscates a student's pencil because he is tapping it in class or poking another student with in and refuses to return it until the end of the year or until the student has made an apology, this taking by the teacher would constitute theft under the rationale of the Court of Appeals.

ARGUMENT AS TO SUFFICIENCY OF THE EVIDENCE TO SUPPORT THAT A TAKING WAS WITHOUT CONSENT

The Court of Appeals found that there was substantial evidence to support the finding beyond a reasonable double that Darrell Wessels obtained the transmitter

without the consent of Dennis Gabel. At page 4 of its decision, it sets forth those facts as follows:

1. Defendant had made incriminating statements during his recorded conversation with Gabel.
2. Gabel testified that Defendant tried to rip the microphone off of him and grabbed wire cutters in an attempt to cut wires.
3. Once Gabel had removed the transmitter, the Defendant grabbed it and would not return it, even though asked to do so.

Of these three "facts", only the third actually relates to the issue of whether Dennis Gabel consented to the transmitter being in the Defendant's possession. If the record, in this case, was solely limited to the testimony of Darrell Wessels and the testimony of Dennis Gabel on this point, then the Court of Appeal's decision in this matter would be well taken. However, it is uncontested in the record that the microphone transmitting to Agent Day's tape recorder was on until immediately prior to Gabel and Wessels exiting the office building. According to Dennis Gabel, he made his comment about wanting the transmitter from Darrell before exiting the building. The tape clearly shows that there was never any request by Darrell that Dennis turn the transmitter over to him and there was never any request by Dennis that Darrell return the transmitter to him. The law on this point is that if property is initially obtained by consent at the time that property is transferred, then there can be no theft, even if consent is later withdrawn. State vs. Kelly, 331 SE2d 227 (N.C. App. 1985). Further, proof of non-consent is an indispensable element of the crime and must be proved by the State beyond a reasonable doubt. It is not an affirmative defense to be raised by the Defendant. State vs. Durnham, 196 NW2d 428 (Iowa 1972), at page 430. See also 50 AmJur2d Larceny, Section 23, page 176:

> *"On the same principle, if one, without an intent to steal, comes into possession of the goods of another with his consent, a subsequent felonious conversion of the good to his own use without the owner's consent cannot constitute larceny."*

Further, if the person with possession, even if he is not the owner, authorizes the taking, then there is said to be consent, People vs. McCormick, 784 P2d 808 (Colo. App. 1989). For example, if a law enforcement official intentionally allows a defendant to obtain government property in the course of their investigation or police work, then there is no theft, as the taking is said to be done with consent, U.S. vs. Hill, 835 F2d 758; Fussell vs. U.S, 505 A2d 72 (DC App 198 1); State vs. Durnham, 196 NW2d 428 (Iowa 1972). Further if property is voluntarily turned over to another person, the consent is.

"... *presumed unless the evidence shows that it is not a voluntary act but is the result of actual fear induced by threats calculated to excite a reasonable apprehension of bodily injury. . .*

50 AmJur2d Larceny, Section 34, page 191.

In summary, it was error for the Court of Appeals to find that the State had proved beyond a reasonable doubt by substantial evidence that Darrell obtained the transmitter without Dennis Gabel's consent. While it is entitled to draw inferences from evidence, the inference must be fair and legitimate. State vs. Hall, 371 NW2d 187, 188 (Iowa App. 1985), and the evidence must still be sufficient to convince a rational trier of fact that the defendant is guilty of the crime beyond a reasonable doubt, State vs. LeGear, 346 NW2d 21, 23 (Iowa 1984), State vs. Torres 506 NW2d 470, 472 (Iowa App. 1993). The best direct evidence on this issue of consent is the tape itself. It clearly indicates that Dennis voluntarily gave Wessels the transmitter. For at least one minute, it is uncontested that Darrell was talking on the phone several feet from Dennis. If Dennis did not want him to have the transmitter, he could have exited the building instead of taking it off. Further, Darrell knew that the transmitter was still transmitting, so it is unlikely that he would make any forceful demands for the transmitter from Dennis or expect that any forceful demands would meet with success. Further, before the phone call, Darrell had ascertained that it was a transmitter and not a tape recorder, so there was obviously no benefit to have control over it as a means of destroying evidence.

ARGUMENT AS TO SUFFICIENCY OF THE EVIDENCE TO SUPPORT INTENTION TO PERMANENTLY DEPRIVE THE OWNER OF THE PROPERTY

The Court of Appeals further found substantial evidence to support the factual element that Mr. Wessels intended to permanently deprive the State of its transmitter based on two facts:

1.Once Gabel had removed the transmitter the defendant grabbed it and would not return it, though asked to do so; and

2. When asked by a DCI agent, the defendant again refused to do so.

Uniform Jury Instruction 1400.2, states:

"*The intent to "deprive the other" of the property means to permanently withhold or withhold for so long or under such circumstances, that its benefit or value is lost; or, the property is disposed of so that it is*

unlikely that the owner will recover it."

A person's mere taking of another's property does not constitute larceny in absence of felonious intent, State vs. Cox, 34 NW 616 (Iowa 1949). Intent to permanently deprive, in the theft case, almost always has to be proved by circumstantial evidence, Peol2le vs. Martin-Trigona, 444 NE2d 527 (111. App. 1982). This intent must exist contemporaneously with the time when the defendant obtains actual possession of the property, State vs. Smith, 202 NW 511 (Iowa 1925). A failure to act with stealth is an indication that an individual is not intending to permanently deprive the owner of property, Tate vs. State, 706 P2d 169 (Okla. Cr. 1985) and State vs. Schmidt, 30 NW2d 473 (Iowa 1948) If there exists a short term purpose for depriving somebody of their property, then the intent to permanently deprive will not be found. Warren vs. State, 784 SW2d 56 (Tex App I Dis 1989). In this case, a police officer was temporarily deprived of his pants to hamper his activity. Further, if the person taking the property has a condition for the return of the property, then there can be no intent to permanently deprive the owner of the property. See State vs. Dumham, Supra. In State vs. Ferrel, 679 P2d 224 (Mont 1994), defendant held onto a check until the owner of the check paid for damage to her garden. No intent was found to deprive in this case. In Manley vs. State, 633 SW2d 881 (Tex. Cr. App 1982), defendant restaurant customer left without paying for his meal because he had asked for a discount and had not been told whether he would be entitled to it yet. He left his business card with a remark which indicated when the matter could be satisfactorily resolved, he would pay. Once again intent to permanently deprive was not found. Another circumstance to consider is how long the person obtaining the property voluntarily held onto it. In People vs. Davis, 523 NE2d 163 (111 App 2 Dist. 1988), an individual who took a gun and held onto it for ten months was found to have intended to permanently deprive the owner of the property. See also State vs. Wood, 46 Iowa 116.

The absolutely uncontested evidence of Mr. Wessels' intent with respect to the property is as follows:

1. Wessels obtained the property with full knowledge of both Gabel and the DCI agents;

2. Wessels had no apparent need for a transmitter for his personal us in connection with his business or otherwise, nor did he have an apparent need for the property so that he could sell it to provide him with money;

3. Wessels indicated that he wanted the transmitter temporarily to show it to his attorney as proof of the State's invasion of his privacy;
4. Wessels phoned his attorney immediately after hiding the transmitter in a place where he could get it and it would not be found by the DCI agents if they immediately came to search;

5. When he was asked by the DCI agents about the transmitter, he indicated, *"I don't have it now"* and immediately asked to phone his attorney again;
6. The transmitter was actually delivered to his attorney's office by his wife, on his instruction within four hours of hiding it;
7. The transmitter was not damaged in any way and was functional on its return.

The intent element of the offense of theft requires "specific intent". Other than the expressed intention of Mr. Wessels that he was not intending to hang onto the property permanently, there was no direct evidence of his intent in the record. If the State is relying on any other evidence to support a different intent, that evidence must be circumstantial. In order for the evidence to be probative, it must raise a fair inference of guilt, it must do more than create speculation, suspicion or conjecture, State vs. Schrier 300 NW2d 305 (Iowa 1981). State vs. Salkil, 441 NW2d 386 (Iowa App. 1989). The only possible inference that can be made from Mr. Wessels' conduct after he was given the transmitter by Gabel, and before he was arrested, a period of 15 to 20 minutes, if closely examined, is that he did not intend to keep it permanently. The only other possible theory in absence of Defendant's need to use a transmitter himself or to sell it, is a vengeance motive, i.e. Darrell was so angry with the State that he wanted to deprive it of its property forever. If this were the case, there would be no reason why he could not have smashed it, dropped it down a well, et cetera, to make it inoperable. The very fact that Wessels said *"I don't have it now"*, when asked about the property, indicates that he was planning to have it in the future and could have turned it over in the future. The most telling fact is that the State never offered any theory of why Darrell would want to permanently deprive the DCI of this transmitter at any stage of the proceedings. In short, the circumstantial evidence in the record does not support a fair inference that Wessels intended to permanently deprive the State of its property.
It is easy to understand just how ridiculous a finding of "intent to permanently

deprive", the State of Iowa of a transmitter is in this case, when comparing it to other theft cases appealed to this Court on the issue of intent. In State vs. Ascaossey, 203 NW2d 731 (Iowa 1972), this Court found sufficient evidence to support a finding of intent to deprive. On the night in question, a store closed at 9:00 p.m. Sometime after I 1:00 p.m., the defendant and the store's assistant manager backed up to the loading dock with a van type of truck and loaded approximately $400.00 worth of merchandise into the truck. The defendant then drove the truck into the driveway of his home, under the watchful eyes of two police officers. The assistant store manager gave the police a written statement claiming that the defendant flashed large sums of cash and asked him if he wanted to make some money and then proposed that they obtain cigarettes and other items from the store and defendant would pay the assistant manager half of the retail value. The assistant manager said that thefts of this nature had already taken place on two previous occasions and that the case under consideration was the third such theft. In another case, State vs. Auerbach, 283 NW2d 278 (Iowa 1979), this Court determined that a guilty plea had to be invalidated because the record did not have sufficient evidence to show that the defendant intended to permanently deprive the owner of a vehicle. In the case, defendant indicated that he took a vehicle that was not his and he did not intend to return the vehicle to its owner. The argument on appeal was that his lack of intent of returning the vehicle is not the same thing as an intent to permanently deprive. He could have intended to leave it, for example, in a location where the owner would find it or return it to a third person for ultimate return to the owner. The facts of this case are quite similar to the facts in Darrell Wessels' case. The only thing shown by the record for certain, if one ignores Darrell Wessels' explanation of his intent, is that:

1. The property was actually withheld for 15 or 20 minutes by the defendant himself, before he was arrested.
2. When the defendant was asked for the property, he said *"I don't have it now"*.
3. The property was not disposed of so that it was unlikelyto be recoverable.

In short, the original verdict in this case was a GROSS MISCARRIAGE OF JUSTICE and the decision of the Court of Appeals is also.

In summary, this Court should recognize that the logic of the dissent of Justice Sackett is clearly more compelling than the unreasoned and superficial decision of Justices. Habhab and Huitink. This matter should be reviewed by the

Supreme Court.

"s/ Judith O'Donohoe"
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CERTIFICATE OF FILING

I, Judith O'Donohoe, hereby certify that I filed the attached Application for Further Review by depositing eighteen copies thereof in the Clerk of Court's office at the Statehouse, State Capitol, Des Moines, Iowa 50319.

"s/ Judith O'Donohoe"

CERTIFICATE OF SERVICE

I, Judith O'Donohoe, hereby certify that on the 19th day of September, 1996, I served the attached Application for Further Review by mailing two (2) copies thereof to the Attorney General's Office,, Criminal Appeals Division, Hoover Building, Des Moines, Iowa 50319.

"s/ Judith O'Donohoe"

ATTORNEY'S COST CERTIFICATE

I hereby certify that the actual cost of producing the foregoing Application for Further Review is the sum of $140.00.

"s/ Judith O'Donohoe"

IN THE SUPREME COURT OF IOWA

No. 95-1070

Mitchell County Nos. 4149 & 4167

ORDER

STATE OF IOWA,
Plaintiff-Appellee,

VS.

DARRELL L. WESSELS,
Defendant-Appellant.

After consideration by this court en banc, further review of the above captioned case and appellee's motion to strike are denied.

Dated this 1st day of November, 1996.
THE SUPREME COURT OF IOWA

"s/ Arthur A. McGiverin"
Arthur A. McGiverin, Chief Justice

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